STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

DOROTHY MINTER,

Plaintiff-Appellee,

v

CITY OF GRAND RAPIDS and JOHN EDWARD RHEEM WETZEL,

Defendants-Appellants.

Supreme Court Case No. _____

Court of Appeals Case No. 273017
Opn 4-12-07

Kent County Circuit Court
Case No. 03-05719-NI
P. Sullivan

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DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

CATHERINE M. MISH (P52528)
Assistant City Attorney
Attorney for the City of Grand Rapids
and John Edward Rheem Wetzel

300 Monroe Ave., NW
Grand Rapids, MI 49503
(616) 456-4023

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STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS MAJORITY ERRONEOUSLY HOLD THAT MATERIAL QUESTIONS OF FACT EXISTED REGARDING THE NATURE AND EXTENT OF PLAINTIFF'S INJURIES, WHEN IT REVERSED THE TRIAL COURT'S RULING TO THE CONTRARY?

Plaintiff's Answer:	No
Defendants' Answer:	Yes
Trial Court's Answer:	Yes
Court of Appeals Majority Answers:	No

II. IS A DEFENDANT ENTITLED TO SUMMARY DISPOSITION OF A THRESHOLD INJURY CLAIM WHEN A PLAINTIFF FAILS TO FILE A PROPER PHYSICIAN'S AFFIDAVIT PURSUANT TO MCL 500.3135(2)(a), REGARDING A POSSIBLE CLOSED HEAD INJURY ?

Plaintiff's Answer:	No
Defendants' Answer:	Yes
Trial Court's Answer:	No
Court of Appeals Majority Answers:	No

III. DID THE COURT OF APPEALS ERRONEOUSLY OVERTURN THE TRIAL COURT'S APPLICATION OF THE *KREINER* FACTORS, REGARDING PLAINTIFF'S CLAIMED CLOSED HEAD INJURY?

Plaintiff's Answer:	No
Defendants' Answer:	Yes
Trial Court's Answer:	Yes
Court of Appeals Majority Answers:	No

IV. DID THE COURT OF APPEALS ERRONEOUSLY OVERTURN THE TRIAL COURT'S APPLICATION OF THE *KREINER* FACTORS, REGARDING PLAINTIFF'S FACIAL SCAR?

Plaintiff's Answer:	No
Defendants' Answer:	Yes
Trial Court's Answer:	Yes
Court of Appeals Majority Answers:	No

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JUDGMENT OR ORDER APPEALED FROM

Defendants file this application for leave to appeal from the published Court of Appeals opinion dated April 12, 2007, in Court of Appeals Docket No. 273017. The Court of Appeals opinion was authored by Judge Alton T. Davis and contained a concurring opinion by Judge Peter D. O'Connell, as well as a concurrence / dissent by Judge Christopher M. Murray.

The issues raised in this appeal involve legal principles of major significance to the state's jurisprudence. This appeal raises issues regarding the proper application of a provision of the state's no-fault act, MCL 500.3135(2)(a)(ii), in auto accident cases seeking the recovery of non-economic damages related to closed-head injuries and facial scars, as well as the proper standards of review applicable to trial court decisions involving permanent serious disfigurements. This case presents the first published Court of Appeals opinion regarding permanent serious disfigurements, since the 1995 amendments to §3135 of the act. The divided Court of Appeals opinion in this case will likely have a significant impact upon future auto accident lawsuits in this state. Defendants contend that the Court of Appeals majority opinion constitutes error requiring reversal.

This Court should **GRANT** this application for leave to appeal, and offer guidance to the bench and bar regarding the proper interpretation and application of the provisions of the no-fault act, MCL 500.3135(2)(a)(ii).

RELIEF SOUGHT

Defendants City of Grand Rapids and John Edward Rheem Wetzel request that this Court **GRANT** Defendants' application for leave to appeal, and award one of the following forms of relief:

(1) issue a peremptory opinion or order **REVERSING** the opinion of the Michigan Court of Appeals and reinstating the trial court's grant of summary judgment, or

(2) **GRANT** Defendants' application for leave to appeal and after full briefing and oral argument, issue a decision **REVERSING** the opinion of the Michigan Court of Appeals.

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STATEMENT OF FACTS

I. Procedural Background.

This is a third-party "threshold" case arising from a vehicle / pedestrian accident on August 15, 2002, at Lafayette and Sycamore S.E., in the City of Grand Rapids. Defendant Wetzel was a uniformed, on-duty Grand Rapids Police officer driving a fully marked police cruiser. As Officer Wetzel responded to a radio call for assistance with a foot pursuit of a criminal suspect, he turned left from Lafayette onto Sycamore and his vehicle struck Plaintiff, who was crossing Sycamore on foot. Defendants have always admitted that Officer Wetzel was at fault in causing the accident.

Plaintiff filed two separate lawsuits. The first lawsuit sought first-party benefits from Defendant City, as Plaintiff was uninsured and claimed that no one in her household carried auto insurance, at the time of the accident. That lawsuit for first-party benefits was settled by the parties. This action is the second lawsuit, in which Plaintiff seeks to recover non-economic damages for "threshold" injuries. Plaintiff filed this third-party lawsuit against Officer Wetzel individually and the City, as the vehicle owner.

After discovery closed, Defendants took an interlocutory appeal on governmental immunity issues. When the case returned to the trial court for further proceedings, Defendants moved for summary disposition of Plaintiff's "threshold" injury claims, pursuant to MCR 2.116(C)(10). Defendants argued that Plaintiff did not suffer a serious impairment of body function or a permanent serious disfigurement, as defined under Michigan law. MCL 500.3135(1); *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). The trial court granted Defendants' motion and dismissed Plaintiff's claims, in their entirety.

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A. Trial Court's Holding.

First, the trial court found there was no factual dispute between the parties regarding the nature and extent of the four injuries alleged by Plaintiff: (1) a broken toe, (2) a cervical strain, (3) a mild closed head injury, and (4) a facial scar.[1] The trial court found that each of the four identified injuries qualified as an objectively manifested impairment. However, the trial court also found that the four injuries had not significantly affected Plaintiff's life so as to satisfy the threshold of a serious impairment of body function. Further, the trial court found that Plaintiff's forehead scar did not qualify as a permanent serious disfigurement because it was "relatively small" and "not readily noticeable."[2] Therefore, the trial court determined that none of these injuries met the statutory threshold for recovery of non-economic damages, and the granted Defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

B. Court of Appeals' Holding.

Plaintiff appealed as of right from the trial court order granting summary disposition in favor of Defendants. The Michigan Court of Appeals issued an authored, published opinion affirming in part and reversing in part the trial court's grant of summary disposition. The Court of Appeals unanimously affirmed the grant of summary disposition with regard to Plaintiff's broken toe and cervical strain claims. However, the Court of Appeals majority reversed the grant of summary disposition with regard to Plaintiff's closed head injury and facial scar claims and remanded this lawsuit for trial on the closed head injury and facial scar claims. The dissenting judge would have affirmed the trial court's ruling in its entirety.

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[1] Trial Court Opinion dated August 18, 2006, p 3.
[2] *Id.* at pp 4-6.

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II. Facts Regarding the Vehicle / Pedestrian Accident.

A. Summary.

The facts surrounding the vehicle / pedestrian accident are undisputed. In summary, Plaintiff Dorothy Minter was on foot, crossing Sycamore Street southbound, on the east side of Lafayette.[3] Officer Wetzel was operating a GRPD patrol cruiser, responding to a radio call for assistance. Officer Wetzel was southbound on Lafayette, and came almost to a complete stop, before turning left onto eastbound Sycamore. Officer Wetzel's view of the intersection was blocked by an improperly parked vehicle, and he did not see the Plaintiff until the instant that his vehicle came into contact with her. The patrol cruiser's front passenger headlight assembly clipped Plaintiff and she was thrown to the pavement. Officer Wetzel immediately stopped and rendered first-aid to Plaintiff, caring for her until the ambulance arrived.

B. Officer Wetzel's Response to the Police Foot Pursuit.

Officer Wetzel testified that he came on duty on August 15, 2002 at 4:15 p.m. After line-up, at about 4:45 p.m., he obtained a patrol car from the parking garage and began driving to his assigned area of responsibility on the north-east end of town.[4]

Officer Wetzel was driving his patrol car northbound on North Division near Newberry, N.E. when he received radio traffic regarding a foot pursuit near Lafayette, S.E. According to the GRPD's "CAD" (Computer-Aided Dispatch) records, Officer Wetzel received this information and responded to assist at 4:58 p.m.[5] Pursuant to

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[3] For those unfamiliar with the City of Grand Rapids, Lafayette Ave. runs north-south, while Sycamore Street runs east-west. However, it should be noted that Sycamore "jogs" at Lafayette. Plaintiff's injuries occurred within the northernmost intersection, where Sycamore proceeds east from Lafayette. *See* Brief Supporting Defendant Wetzel's Motion for Summary Disposition, Exhibits A and B, Trial Court Record.

[4] Brief Supporting Defendant Wetzel's Motion for Summary Disposition, Exhibit C, pp 9-10, 14, Trial Court Record.

[5] *Id.*, Exhibit D, p 3.

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department policy and his duty as a sworn police officer, he responded by immediately turning his patrol car and heading for the location of the foot pursuit. Officer Wetzel responded with emergency lights and siren activated.

While proceeding southbound on Lafayette, Officer Wetzel heard "continuous" radio traffic regarding the foot pursuit, including radio traffic from the lone police officer pursuing the criminal suspect on foot, as well as radio traffic from other officers arriving on scene in their patrol cars. However, at this point, Officer Wetzel did not know the reason for the foot pursuit, the identity of the police officer conducting the pursuit, or the offense that the fleeing suspect had committed.[6]

When Officer Wetzel turned south onto Lafayette, he was following another GRPD patrol cruiser, driven by Officer Kelly Swanson, who had also engaged her emergency lights and siren while southbound on Lafayette. Officer Wetzel testified that he does not drive more than 10 mph in excess of the posted speed limit, even when responding to emergency calls, when driving on what he considers to be a "congested" street. Officer Wetzel considered Lafayette to be a "congested" street, given its residential character, the presence of street parking on both sides, and the posted speed limit of 25 mph. He also described Lafayette as a "busy street," and stated that he had arrived during "rush hour."[7] He also noted that both he and Officer Swanson had to repeatedly slow down because there were civilian vehicles on Lafayette, traveling both northbound and southbound. Therefore, Officer Wetzel testified that he did not exceed 35 mph at any time, while traveling southbound on Lafayette.[8]

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[6] *Id.*, Exhibit C, pp 15-18.
[7] According to the GRPD's Computer Aided Dispatch records, Officer Wetzel arrived at the intersection of Lafayette and Sycamore, S.E. at approximately 5:01 p.m. (*Id.*, Exhibit D, p 1.)
[8] *Id.*, Exhibit C, pp 17-21.

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In addition to his and Officer Swanson's police cruisers, Officer Wetzel also noted two police cruisers that were northbound on Lafayette turn onto eastbound Sycamore. In addition, Officer Wetzel saw three or four patrol cruisers parked against Lafayette's east curb, facing northbound, but south of Sycamore. Those police officers had bailed out of their vehicles to assist the lone officer engaged in the foot pursuit. Tthe vehicle doors were open and the emergency lights on those patrol cruisers remained active. As Officer Wetzel testified:

> They [other police officers] were in the general location. I didn't see them running. I didn't see where they were at. I didn't know if they were in a house. I didn't know where they were at.
>
> You have three or four empty police cars out there with their lights still on, doors open, so it wasn't like they parallel parked and took their time to get out.

As he approached Lafayette, Officer Wetzel began looking for a place to park his vehicle. Because Officer Swanson pulled into the last open parking spot, Officer Wetzel needed to find a different place to park before he could assist in the foot pursuit.[9]

While still facing southbound on Lafayette, and while Officer Swanson was pulling off to the right, Officer Wetzel turned off his emergency lights and siren and came almost to a complete stop. He slowed to a speed of approximately 1 to 2 mph. Officer Swanson pulled over to the right, turned off her lights and siren, and brought her cruiser to a complete stop. At that instant, Officer Wetzel heard other police officers "yelling on the radio that they needed more cars to the east." To go east, Officer Wetzel needed to turn left, up Sycamore towards Prospect. As he resumed forward momentum, Officer Wetzel re-activated his emergency lights, but not his siren.[10]

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[9] *Id.*, Exhibit C, pp 22-23, 25.
[10] *Id.*, Exhibit C, pp 30-32.

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C. **The Accident.**

As Officer Wetzel approached Sycamore and began to make the left turn onto Sycamore, his view was blocked by vehicles parked on the east side of Lafayette, facing northbound.[11] First, there was a large yellow school bus that had been converted for private use, with its tail end approximately 20 feet from the intersection of Lafayette and Sycamore.[12] There was also another vehicle, "a large car or a van or a minivan," between the bus and the intersection. As Officer Wetzel testified: "It was a large-sized vehicle that blocked my view of the immediate sidewalk by the intersection."[13]

Officer Wetzel was forced to "swing wide to come around that vehicle south of the bus." Unbeknownst to Officer Wetzel, Ms. Minter was crossing Sycamore at that very instant, her head turned to the left up Sycamore, apparently watching the two police cruisers which had just turned from northbound Lafayette up eastbound Sycamore. Officer Wetzel saw Ms. Minter the same instant that his vehicle came into contact with her. The front of the police car, near the front passenger headlight assembly, made contact with Plaintiff.

This is neither a case involving a high-speed police pursuit, nor a case where a police officer was driving recklessly down a residential street. At the time of the accident, the police officer was traveling 14 mph, well below the 25 mph speed limit. The police officer simply made a left turn without obtaining a clear view of the crosswalk area. Officer Wetzel admitted that he turned without a clear view, and admitted that he did not yield the right-of-way to Plaintiff when she was crossing the street.[14]

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[11] *Id.*, Exhibit C, p 33.
[12] Photos of the bus, parked along the curb, were made part of the lower court record. *Id.*, Exhibit E.
[13] *Id.*, Exhibit C, pp 28-29, 33, 45.
[14] *Id.*, Exhibit C, pp 34-35, 46-47.

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III. Plaintiff's Injuries Were Fairly Minor.

Plaintiff sustained only minor injuries as a result of this accident. Plaintiff fractured the big toe on her right foot, strained the muscles in her neck and shoulder (i.e., cervical strain), and sustained a laceration above her eyebrow which required stitches. Plaintiff was also treated for a mild closed head injury. As the trial court found with regard to the broken toe, cervical strain, and mild closed head injury, "the duration of the impairments was not prolonged."

> Within one month following the accident plaintiff's toe fracture had healed and plaintiff testified she had no trouble walking due to her toe. Plaintiff wore a soft collar for approximately three weeks for the cervical strain and at her deposition stated that her neck and shoulder discomfort resolved after approximately five or six months. Immediately after the accident plaintiff suffered from dizzy spells, but by December 2002 her treating physician felt that these spells were no longer a concern of any significance. Plaintiff does continue to experience headaches, but the intensity and duration of these has significantly decreased. Although plaintiff feels that she is more forgetful now than before the accident, she successfully completed the long and short term goals of the recommended therapies designed to assist her with the cognitive deficiencies and her doctor did not believe that further therapy was needed.[15]

The trial court found that the scar about Plaintiff's eyebrow was a permanent disfigurement. However, after reviewing the objective characteristics of the scar, the trial court found that it was not a permanent "serious" disfigurement.[16]

A. Plaintiff's Pre-Accident Health Complaints.

Plaintiff was 67 years old at the time of the accident and she was receiving both age and disability-related social security benefits before the accident, having received SSDI benefits since 1996.[17] Plaintiff had a kidney removed in 1993, and had worn an urinostomy bag for years, before this auto accident occurred. Plaintiff testified that the

kidney removal caused her chronic, long-term back pain and that her pre-accident disability prevented her from doing any lifting and prevented her from standing for long periods of time.[18]

B. Plaintiff's Accident-Related Hospital Visit.

After the accident, Plaintiff was taken by ambulance to Spectrum Butterworth Hospital in Grand Rapids. She remained at the hospital four (4) hours.[19] Upon arrival at the ER, a CT scan of Plaintiff's head and cervical spine showed no fracture, but did indicate some arthritic, age-related conditions in the cervical spine.[20] An ER physician used sutures to repair the laceration above her eyebrow.[21] Plaintiff was discharged that same day, with instructions to follow up in 7-10 days with the hospital's on-staff orthopedic specialist, Dr. Bielema.[22]

C. Plaintiff's Broken Toe.

One day later, Plaintiff returned to the hospital with a pain complaint related to the big toe on her right foot, and it was determined that Plaintiff had sustained a fracture to her big toe. Plaintiff was treated with a soft shoe, but Plaintiff testified that her toe was never taped. Plaintiff testified that she was never given any physical restrictions related to her toe, she was never given ambulatory aides other than the soft shoe, and there were no activities of any kind that she was prevented from doing, as a result of the broken toe.[23] Plaintiff testified at one point in her deposition that she only wore the soft

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[15] Trial Court Opinion dated August 18, 2006, p 5.
[16] *Id.*, pp 6-7.
[17] Brief Supporting Defendants' Summary Disposition Motion, Exhibit B, pp 10, 12, Trial Court Record.
[18] *Id.*, Exhibit B, pp 13-14.
[19] *Id.*, Exhibit C, pp 1-2.
[20] *Id.*, Exhibit D, pp 5-6.
[21] *Id.*, Exhibit D, p 13.
[22] *Id.*, Exhibit C, p 2.
[23] *Id.*, Exhibit B, pp 22-24.

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shoe "a week or so," but testified inconsistently at another point in her deposition that she wore the soft shoe for "maybe a month."[24]

While Plaintiff did follow up with the orthopedic specialist, he was never advised that Plaintiff had a toe injury. Plaintiff did not treat with Dr. Bielema for the toe, and in fact never mentioned it to him.[25] Plaintiff testified that, at the most, she wore the soft shoe for "maybe a month." Further, she testified that her toe was "all healed up" at the time of her deposition and she had no trouble getting around or walking around.[26]

D. Plaintiff's Cervical Strain.

This auto accident occurred on August 15, 2002. The orthopedic specialist, Dr. Bielema, testified at deposition that he treated Plaintiff on only three dates: August 20, 2002, September 3, 2002, and November 19, 2002.

When Plaintiff presented to Bielema on August 20, 2002, she complained of soreness, discomfort, and difficulty with neck range of motion.[27] At her deposition, when asked what problems she experienced with her neck and shoulders due to this accident, Plaintiff testified: "Well, it would get stiff sometimes, and I didn't move my neck as freely as I ordinarily did. . . . Well, it would just ache. That's all."[28]

Bielema's diagnosis was "a cervical strain, basically, sprained muscles in the neck,"[29] or "a stretching of the muscles and not the ligaments."[30] Bielema performed "flexion extension" x-rays of Plaintiff's neck on August 20, 2002. While those x-rays

[24] *Id.*, Exhibit B, pp 23, 61.
[25] *Id.*, Exhibit C, p 7.
[26] *Id.*, Exhibit B, pp 23-24.
[27] *Id.*, Exhibit C, pp 8, 26.
[28] *Id.*, Exhibit B, pp 25-26.
[29] *Id.*, Exhibit C, p 8.
[30] *Id.*, Exhibit C, p 19.

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showed no instability in the neck, and verified that Plaintiff's neck ligaments were intact, they did show degenerative, age-related changes.[31] As Dr. Bielema testified:

> I have an x-ray with no fracture, a CT scan with no fracture, and motion views, flexion and extension views, which don't show instability, therefore, we have an unfractured, stable C-spine, and the diagnosis is cervical strain.[32]

Given the test results from the CT scan, the results from the flexion / extension x-rays, and his diagnosis of cervical strain, Bielema treated Plaintiff with a soft collar. Bielema told Plaintiff to wear the collar "until I saw her next, and it was simply about a couple weeks to let the muscles rest. It was more for comfort than protection." Plaintiff was no longer wearing the soft collar when she saw Bielema again on September 3, 2002, less than 3 weeks after the accident. As Bielema noted, "I said she weaned the collar, meaning she came in without it, and she was feeling pretty well in that regard."[33] When he treated Plaintiff next, on September 3, 2002, Bielema felt that:

> Her [Plaintiff's] cervical strain was resolved. Basically, she wasn't having much trouble . . . [T]o my recollection she said her neck wasn't uncomfortable. In other words, she didn't need her collar. So I didn't have a lot of evidence at that stage that she was having restriction of movement or a lot of discomfort.[34]

Dr. Bielema's office issued an "Attending Physician's Report" dated November 4, 2002, on which he described Plaintiff's diagnosis as "resolved cervical strain."[35] Bielema also testified at his deposition that by November 4, 2002, he believed Plaintiff's cervical strain issues had fully resolved.[36]

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[31] *Id.*, Exhibit C, p 9.
[32] *Id.*, Exhibit C, pp 18-19.
[33] *Id.*, Exhibit C, pp 8, 11.
[34] *Id.*, Exhibit C, p 26.
[35] *Id.*, Exhibit D, p 1.
[36] *Id.*, Exhibit C, p 12.

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Bielema's office also issued a "Disability Certificate" on November 4, 2002, stating that Plaintiff was under certain medical restrictions. Box number one involved restrictions related to housework, including bending, lifting, twisting, and prolonged standing. Box number three involved restrictions related to caring for plaintiff's personal needs, including bending, twisting, lifting, and prolonged standing.[37] Although none of the three boxes on the "Disability Certificate" were marked, Dr. Bielema testified:

> I would check box number three for about two weeks simply for self-care issues and simple things. I would check box number one, which indicates housework, heavy carrying, bending, squatting, et cetera, for about three months.[38]

These restrictions were no different than Plaintiff's pre-accident restrictions related to the kidney removal, which qualified her for SSDI benefits. Plaintiff testified that her pre-accident kidney condition caused her chronic, long-term back pain, and prevented her from doing any lifting or standing for long periods of time.[39] Bielema did not place Plaintiff under any other restrictions, he did not continue any restrictions beyond November 19, 2002, and Plaintiff did not return to Dr. Bielema after that date.

Plaintiff's cervical strain complaints did not present a serious impairment of body function, as they did not present a long-term issue, and did not prevent Plaintiff from engaging in normal life activities. Plaintiff testified that her problems with neck and shoulder soreness were completely resolved within 6 months of the accident, by February 2003.[40] At her deposition in February 2004, Plaintiff testified that she had no neck or shoulder problems remaining.[41]

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[37] *Id.*, Exhibit D, p 2.
[38] *Id.*, Exhibit C, pp 10-11, emphasis added.
[39] *Id.*, Exhibit B, p 13.
[40] *Id.*, Exhibit B, pp 26-27.
[41] *Id.*, Exhibit B, p 26.

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E. Plaintiff's Laceration Above the Right Eyebrow.

Plaintiff received a laceration above the right eyebrow, closed with sutures in the emergency room. Five days after the accident, Bielema examined the laceration, removed the sutures, and referred Plaintiff to another physician for follow-up. As Bielema stated, by this point, "the sutures had done their job and were unnecessary so we removed them."[42]

Although the sutures healed the wound, a scar was created above Plaintiff's eyebrow. When asked about the scar, Plaintiff testified: "I have a dent up here that I rub, and I don't frown. Well, I frown, but it bothers me to frown . . . It hurts sometimes. It doesn't -- it bothers me." She also testified that sometimes the scar itches.[43] However, Plaintiff did not testify that the scar's appearance caused her any embarrassment, social stigma, or other emotional impact.

Dr. Bielema referred Plaintiff to a plastic surgeon, Dr. Leppink, for consultation.[44] Leppink saw Plaintiff on December 4, 2002, and reported that the "laceration was repaired and the results are quite good." However, Plaintiff reported irritation "when she wrinkles her forehead." Dr. Leppink suggested a possible trapped nerve above the eyebrow, which could be resolved by a surgical procedure to remove a section of nerve beneath the scar. However, Leppink reported that "the patient is not interested in proceeding with surgery."[45] Plaintiff also consulted with another plastic surgeon, Dr. Lawson, whose records described an above-the-eyebrow scar with two components: one 11 mm in length and one 13 mm in length. Dr. Lawson also opined that even with

[42] *Id.*, Exhibit C, pp 5, 13.
[43] *Id.*, Exhibit B, p 28.
[44] *Id.*, Exhibit C, p 13.
[45] *Id.*, Exhibit E, emphasis added.

plastic surgery, the scarring would likely be permanent. Plaintiff, however, admitted at her deposition that she had no current plans to pursue any surgery related to the facial scar or the potential trapped nerve above the eyebrow.[46]

F. Plaintiff's Mild Closed Head Injury.

Plaintiff also treated with Dr. VandenBerg, the medical director of the Mild Brain Injury Program at Spectrum Health in Grand Rapids. Although he diagnosed Plaintiff with a mild traumatic brain injury, his treatment plan for Plaintiff was short-term, as he treated Plaintiff on only three dates: October 3, 2002, November 4, 2002, and December 17, 2002.[47]

1. The October 3, 2002 Office Visit.

Dr. VandenBerg testified that Plaintiff first saw him on October 3, 2002 with only a "slight restriction" in her head and neck range of motion. Plaintiff reported upon presentation that she had a history of arthritis. Dr. VandenBerg reviewed the ER room CT scan of the head and cervical spine, which showed no hematoma. He performed a second CT scan of the head and cervical spine on October 3, 2002, which also showed no hematoma. He testified that Plaintiff's cervical x-rays were "unremarkable."[48] Plaintiff reported a possible loss of consciousness at the scene of the accident, of extremely brief duration. Plaintiff reported to Dr. VandenBerg that she recalled being at the accident scene "with a number of people around her," and recalled the ambulance ride.[49]

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[46] *Id.*, Exhibit B, p 31, 51.
[47] *Id.*, Exhibit F, p 8.
[48] *Id.*, Exhibit F, pp 12-13, 17.
[49] *Id.*, Exhibit G, p 3.

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On October 3, 2002, Plaintiff complained of headaches, which were reported to be "daily but not constant." Plaintiff also complained of dizziness, which typically occurred "with changes in position." While this dizziness involved feeling "unsteady," which "lasts approximately 5-10 minutes and then resolves," the dizziness never caused Plaintiff to fall down. Finally, Plaintiff complained of "ringing in the ears that is intermittent every two to three days." By October 3, 2002, the ringing in the ears had "decreased in frequency since the accident."[50]

Dr. VandenBerg had three recommendations for Plaintiff's treatment. First, he recommended a "brief evaluation by the Speech and Language Therapist because of the 'forgetfulness' that she is having." Yet, the doctor noted on October 3, 2002: "I think all in all she is doing well from this standpoint." Second, he recommended a physical therapy program to address Plaintiff's complaints of cervical pain and headaches. Finally, he recommended "the Occupational Therapist to briefly work with her as it relates to the dizzy episodes that she is having with changes in position."[51]

2. <u>The November 4, 2002 Office Visit</u>.

On her second visit, November 4, 2002, Dr. VandenBerg noted that Plaintiff's headaches "continue to be an issue but are much better than they were before. There is a significant reduction in the intensity of the headaches." Plaintiff also reported that "her dizziness is far less," occurring only two times per week at that point. Dr. VandenBerg then made these observations: "As far as her cognition, she generally is doing well. There have been some issues with forgetfulness at home and attention to detail, but she is making gains and using strategies appropriately that have been

[50] *Id.*, Exhibit G, pp 1-2.
[51] *Id.*, Exhibit G, p 3.

reviewed by the therapist."[52] VandenBerg also noted that Plaintiff's gross cervical motion was improving, but she continued to have decreased segmental motion in the spine from C-2 to C-5. According to VandenBerg, "otherwise, I thought she was looking good." He prescribed hot packs and physical therapy directed at those issues of the cervical spine.[53]

3. The December 17, 2002 Office Visit.

On Plaintiff's last visit to Dr. VandenBerg on December 17, 2002, he felt that Plaintiff:

> Was generally doing well from a functional standpoint and with the intervention that we had had, which is basically compensatory strategies, that we didn't have anything further to offer her and that she was making improvements.[54]

Dr. VandenBerg's also noted that Plaintiff had "made very nice improvements since her last visit," that Plaintiff's neck "still is somewhat stiff, but this is much improved from before." Dr. VandenBerg believed that any complaints of dizziness were "fading away" by December 17, 2002, and on that date, he concluded that dizziness "wasn't a concern any longer of any significance."[55] As of December 17, 2002, "there was very little residual problems left related to [Plaintiff's] brain injury." As of that date, Dr. VandenBerg "didn't feel she needed any further treatment for her mild traumatic brain injury."[56] Dr. VandenBerg testified at his deposition that Plaintiff met all the short-term and long-term goals of therapy, and was therefore discharged from therapy.[57]

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[52] *Id.*, Exhibit G, p 4.
[53] *Id.*, Exhibit F, p 19.
[54] *Id.*, Exhibit F, p 28.
[55] *Id.*, Exhibit F, p 29.
[56] *Id.*, Exhibit F, p 69.
[57] *Id.*, Exhibit F, pp 21-23.

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Plaintiff never returned to Dr. VandenBerg with any complaints, after December 17, 2002. In addition, Dr. VandenBerg only referred Plaintiff to the previously mentioned physical therapist, vestibular therapist, and speech and language therapist, which all completed their treatments by November 27, 2002. Dr. VandenBerg never prescribed in-home assistance for Plaintiff, and never restricted any of her daily activities.[58]

4. Plaintiff Engaged in Limited Therapy Sessions.

Plaintiff did pursue the therapy recommended by Dr. VandenBerg: a speech and language therapist, a vestibular therapist, and a physical therapist. However, her course of treatment was again very short-term. Plaintiff saw the speech and language therapist from October 9, 2002 through November 27, 2002. She saw the vestibular therapist from October 10, 2002 through November 4, 2002. Finally, she saw the physical therapist from October 9, 2002 through November 14, 2002. Plaintiff met all the short and long term goals of therapy, and was successfully discharged. Dr. VandenBerg did not feel, in his medical judgment, that Plaintiff needed any continued therapy after late November 2002.[59]

In summary, the medical director of West Michigan's premier Mild Brain Injury Program personally treated this Plaintiff for a mild traumatic brain injury. He discharged Plaintiff from treatment less than four (4) months after this auto accident, with no suggestions for any further necessary treatment. This specialist felt that Plaintiff's medical condition had resolved to the point where she did not need any additional therapy or treatment after December, 2002.

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[58] *Id.*, Exhibit F, pp 24-25.
[59] *Id.*, Exhibit F, pp 21-23.

5. Plaintiff's Family Physician, Dr. Mervyn Smith.

Dr. Mervyn Smith, who practices at a local health clinic, apparently treated Plaintiff, as well. Defendants never deposed Dr. Smith, and never obtained a copy of his medical records regarding his treatment of Plaintiff. While Plaintiff attached some of Dr. Smith's medical records to her brief opposing Defendants' motion for summary disposition on the question of threshold injury, Plaintiff did not attach any written statement or "affidavit" from Dr. Smith to that brief. At the court hearing on Defendants' motion, Plaintiff's counsel produced for the first time a brief written statement from Dr. Smith. However, the written statement was not notarized and therefore was not given under oath. Further, the written statement did not properly indicate that Dr. Smith "regularly diagnoses or treats closed head injuries," as required by MCL 500.3135(2)(a)(ii).

Additional facts may be set forth below, where pertinent to the parties' arguments.

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ARGUMENT

I. The Court Of Appeals Erroneously Held That Material Questions Of Fact Existed Regarding The Nature And Extent Of Plaintiff's Injuries, So As To Preclude The Trial Court From Reviewing The Matter As A Question of Law.

A. Standard Of Review.

"This Court reviews de novo the grant or denial of summary disposition. Similarly, questions of statutory interpretation are reviewed de novo." *Kreiner*, *supra* at 129 (internal citations omitted).

B. The Existence Of A Threshold Injury Is Generally A Question Of Law For The Trial Court To Decide.

In 1995, the Legislature amended the no-fault insurance act, altering §3135, which contains the threshold standards for recovery of non-economic damages by persons injured in motor vehicle accidents. Basically, the 1995 amendments to §3135 rejected this Court's ruling in *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986) in favor of the tests set forth by this Court's earlier ruling in *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982). See *Kreiner*, *supra* at 121, n 8. In particular, the 1995 amendments to §3135 directed that the "courts, not juries, should decide these issues" of whether particular injuries satisfied the threshold standards of §3135. *Id.* at 121. "One of the major changes of the legislation was to make the determination of threshold injury (serious impairment of body function or permanent serious disfigurement) an issue of law rather than an issue of fact." *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000).

The statute, MCL 500.3135(2)(a), provides:

> (a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

C. <u>There Was No Material Factual Dispute In This Case, Concerning The Nature And Extent Of Plaintiff's Injuries</u>.

In this case, the trial court ruled that there was no material factual dispute between the parties concerning the nature and extent of any of Plaintiff's injuries. Therefore, the trial court proceeded to consider the matter of threshold injury as a question of law, stating:

> It does not appear that there is a dispute between the parties regarding the nature and extent of plaintiff's injuries. Looking at the claimed injuries in the light most favorable to plaintiff, it is apparent that plaintiff suffered a fractured toe, cervical strain, and laceration about the right eyebrow. Although the toe fracture has healed, plaintiff continues to suffer occasional neck pain. As there is no factual dispute between the parties on this issue, the court must therefore determine the issue of serious impairment as a matter of law.
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> For a question of fact to be created in regards to a closed head injury, a licensed allopathic or osteopathic physician who regularly diagnoses such injuries must testify under oath that there may be a serious neurological injury. MCL 500.3135(2)(a)(ii). Plaintiff has provided the affidavit of Mervyn Smith, a doctor who specializes in family practice, which states that plaintiff's symptoms may meet this threshold. Because MCL 500.3135 requires that the testimony provided by from a licensed allopathic or osteopathic physician and Dr. Smith is a family practitioner, he does not fulfill the statutory requirement. However, the deposition testimony of Dr. VandenBerg, an allopath was provided. Nevertheless, his testimony fails to fulfill the statutory requirement as it does not state that the mild traumatic brain injury rose to the level of a serious neurological injury. Accordingly, the court is of the opinion that there is no question of

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fact regarding the closed head injury and this issue may likewise be decided as a matter of law.[60]

The Court of Appeals majority disagreed with the trial court, ruling that material factual disputes did exist between Plaintiff and Defendants, regarding the nature and extent of both Plaintiff's closed head injury and facial scar.[61] Defendants contend that the Court of Appeals majority committed error requiring reversal, in ruling that material factual disputes existed regarding these injuries.

1. There Was No Material Factual Dispute Concerning The Nature And Extent Of Plaintiff's Closed Head Injury.

With regard to the closed head injury, the Court of Appeals majority stated:

> The parties do not dispute the bare fact that plaintiff sustained a closed head injury. . . . The headaches of which she complains are irrelevant under *Kreiner*. However, she also asserts that she suffers from dizziness, confusion, and blurred vision; as a result, she has a reduced ability to locomote independently, to perform routine tasks necessary to life, and to engage in the social activities she enjoyed previously.
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> * * *
>
> Moreover, defendant apparently disputes some of these complaints, giving rise to a "factual dispute concerning the nature and extent of the person's injuries" that is "material to the determination as to whether the person has suffered a serious impairment of body function." Therefore, the conditions of MCL 500.3135(2)(a) necessary to make the determination one of law for the court are not satisfied.[62]

The dissenting Court of Appeals judge would have affirmed the trial court's decision that there was no material factual dispute between the parties regarding the nature and extent of the closed head injury, finding that the issue of threshold injury was properly a question of law for the trial court. As the dissenting judge stated:

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[60] Trial Court opinion dated August 18, 2006, p 3.

[61] The Court of Appeals unanimously affirmed the trial court's grant of summary disposition regarding the broken toe and cervical strain injuries, thereby implying that whether those injuries met the statutory threshold was properly a question of law for the trial court to decide.

[62] *Minter v City of Grand Rapids*, __ Mich App __; __ NW2d __, slip op. at *4 (2007) (emphasis added).

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> Here, in relevant part, the parties do not dispute the nature and extent of plaintiff's closed head injury. Contrary to the majority's general conclusion that defendant "disputes some of these complaints, giving rise to a 'factual dispute concerning the nature and extent of [plaintiff's] injuries,'" any "dispute" regarding what the majority lists as plaintiff's "complaints" are strictly limited to how plaintiff's closed head injury affected her general ability to lead her normal life, and are not disputes concerning the nature and extent of the closed head injury. Therefore, the trial court properly decided this issue as a matter of law. MCL 500.3135(2)(a). Since the trial court could properly decide whether plaintiff's closed head injury constituted a serious impairment of body function, it correctly completed the *Kreiner* analysis by determining if plaintiff's closed head injury constituted an impairment of an important body function, whether any such impairment is objectively manifested, and, if so, whether "the impairment affects [her] general ability to lead [a] normal life." *Kreiner, supra* at 132.[63]

While the Court of Appeals majority vaguely averred that "defendant apparently disputes some of [Plaintiff's] complaints," it did not specify what facts were in dispute. The Court of Appeals majority erred, while the trial court and the Court of Appeals dissenter were correct. There was no material dispute of fact between the parties, regarding the nature and extent of Plaintiff's closed head injury. Plaintiff consulted with her own treating physicians, Dr. Christian VandenBerg and Dr. Mervyn Smith, regarding the closed head injury. Dr. VandenBerg gave a deposition, which testimony was provided to the trial court. Defendants did not depose Dr. Smith, and Defendants did not send Plaintiff to an independent medical exam with regard to her closed head injury complaints. Defendants accepted the testimony of Plaintiff's treating physicians and the contents of their medical records. Defendants simply argued that the testimony and records did not establish that the closed head injury qualified as a serious impairment of body function, as a matter of law.

[63] *Id.*, dissent at *4.

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As the dissenting Court of Appeals judge correctly noted, "any 'dispute' regarding what the majority lists as plaintiff's 'complaints' are strictly limited to how plaintiff's closed head injury affected her general ability to lead her normal life, and are not disputes concerning the nature and extent of the closed head injury."[64] Thus, the Court of Appeals majority incorrectly found that the closed head injury presented a question of fact for the jury, precluding entry of summary disposition in favor of Defendants.

2. There Was No Material Factual Dispute Concerning The Nature And Extent Of Plaintiff's Facial Scar.

The trial court found that there was no material question of dispute between the parties with regard to the physical characteristics of Plaintiff's facial scar. As the trial court stated:

> The scar on plaintiff's forehead is comprised of two parts one 11 millimeters and the other 13 millimeters in length. The color of the scar is slightly lighter than the surrounding skin tone. The scar is undeniably permanent, and considering its characteristics, including its size, color, and location, it is apparent that it constitutes a disfigurement. Nevertheless, it does not have the requisite seriousness to satisfy MCL 500.3135(1). The scar is relatively small and, upon review of the color photographs provided, is not readily noticeable.[65]

The Court of Appeals majority found that a material dispute of fact did exist between the parties, regarding Plaintiff's facial scar. As the majority stated:

> The parties do not dispute the existence of plaintiff's scar. . . .
>
> * * *
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> Defendants discount the scar as objectively too minor to constitute serious disfigurement. It appears that the parties dispute not only the impact of the scar on plaintiff, but the extent of the damage as well. . . . We therefore find that the parties' factual dispute regarding the scar is sufficient to give rise to a jury question.[66]

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[64] *Minter, supra,* dissent at *4.
[65] Trial Court opinion dated August 18, 2006, p 6.
[66] *Minter, supra*, slip op. at 4-5.

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Again, the dissenting Court of Appeals judge would have affirmed the trial court's decision that there was no material factual dispute between the parties regarding the nature and extent of the scar, such that the issue of a threshold injury was properly a question of law for the trial court. As the dissenting judge stated:

> Admittedly, the only dispute between the parties regarding plaintiff's scar -- its "seriousness" -- is a closer question. As noted by the majority, determining the "seriousness" of a scar is a matter of common knowledge and experience for the courts unless there is a question regarding the nature and extent of the plaintiff's scar. There is no such question here, though, because we have plaintiff's exhibits (color photographs) showing the scar, and plaintiff's testimony about the scar. Therefore, contrary to the majority's conclusion that a factual dispute regarding the scar exists, the determination of whether plaintiff's scar constituted a "permanent serious disfigurement" was also a question of law to be decided by the trial court. MCL 500.3135(2)(a).[67]

Again, the trial court judge and the dissenting Court of Appeals judge were correct. There was no dispute of fact regarding the nature and extent of the facial scar. Plaintiff consulted with her own plastic surgeons, Dr. Leppink and Dr. Lawson, who provided some opinions regarding a medical procedure that could reduce Plaintiff's scar.[68] Defendants did not choose to depose either Dr. Leppink or Dr. Lawson, and did not send Plaintiff to an independent medical exam with a different plastic surgeon. Defendants accepted the testimony of Plaintiff's plastic surgeons, but simply argued that the testimony did not establish that the scar qualified as a permanent serious disfigurement, as a matter of law.

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[67] *Id.*, dissent at *6 (internal citations omitted).

[68] Dr. Leppink also provided some opinions regarding nerve entrapment related to the forehead laceration that Plaintiff suffered as a result of the auto accident. However, while the scar itself is properly reviewed under the "permanent serious disfigurement" threshold, Defendants contend that any nerve damage in the area of Plaintiff's forehead is properly analyzed under the "serious impairment of body function" threshold standard, rather than the "permanent serious disfigurement" threshold standard.

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In the trial court, Plaintiff also produced photos of her facial scar. Defendants did not produce alternate photos. Defendants accepted Plaintiff's photographic evidence regarding the appearance of Plaintiff's scar, but simply argued that the photos did not establish that the scar qualified as a permanent serious disfigurement.[69] The Court of Appeals was incorrect when it stated that the parties to this case disputed the characteristics of Plaintiff's facial scar. There was no material factual dispute, and the trial court properly considered whether Plaintiff's facial scar rose to the level of a serious permanent serious disfigurement, as a matter of law.

Defendants respectfully request that this Court reverse the Court of Appeals majority's ruling that material factual disputes existed between Plaintiff and Defendants, regarding the nature and extent of both Plaintiff's closed head injury and Plaintiff's facial scar. Defendants contend that whether these injuries qualified as threshold injuries under §3135 was properly a question of law for the courts to decide, not a question of fact for the jury.

II. While The Trial Court Properly Complied With *Churchman v Rickerson*, That Decision Wrongly Interpreted MCL 500.3135(2)(a)(ii).

The Court of Appeals erroneously concluded that the trial court automatically granted summary disposition on Plaintiff's closed head injury claim because Plaintiff failed to provide the court with testimony under oath regarding that injury, from a properly qualified doctor, pursuant to MCL 500.3135(2)(a). The Court of Appeals majority further determined that the trial court's decision violated the ruling of *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000).

[69] The photo of Plaintiff's facial scar attached to this brief is one of the photos that Plaintiff submitted to the trial court with its brief opposing Defendants' motion for summary disposition.

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Defendants do not believe that the trial court's decision contravened the holding of *Churchman*. However, Defendants also contend that *Churchman* was wrongly decided and request that this Court grant leave to appeal in this case in order to review its primary holding concerning the effect of MCL 500.3135(2)(a)(ii) in cases where a plaintiff does not supply the medical testimony described in that statutory section.

A. The Trial Court Complied With *Churchman v Rickerson*.

The Court of Appeals' majority opinion on this point is worded in a somewhat confusing fashion. However, it appears to Defendants that the majority may have erroneously believed that the trial court automatically granted summary disposition on Plaintiff's closed head injury claim because Plaintiff failed to provide the court with testimony under oath from a properly qualified doctor pursuant to MCL 500.3135(2)(a)(ii). As the Court of Appeals majority ruled:

> It appears to us that the trial court may have concluded that plaintiff was legally unable to establish a serious impairment of body function on the basis of her closed head injury because her treating allopathic physician (who regularly treats closed head injuries) diagnosed her with a "mild traumatic brain injury." If so, this is simply incorrect.
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> * * *
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> If a properly qualified doctor testifies "that there may be a serious neurological injury," there would *automatically* be a jury question. That did not occur here. "The language of §3135 does not indicate, however, that the closed-head injury exception provides the exclusive manner in which a plaintiff who has suffered a closed-head injury may establish a factual dispute precluding summary disposition." *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000). Therefore, the lack of medical testimony on this point only precludes plaintiff from taking advantage of the automatic route to a jury issue, it does *not* necessarily preclude her from establishing a question for the jury by other means.[70]

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[70] *Minter, supra*, slip op. at 3. The majority opinion stated that Plaintiff's "treating allopathic physician (who regularly treats closed head injuries) diagnosed her with a 'mild traumatic brain injury.'" *Id.* It is unclear whether the majority opinion was referring to Dr. VandenBerg or Dr. Smith in this regard. However, later in its opinion, the majority recognized that "no allopathic surgeon provided the requisite testimony to satisfy the second sentence of 500.3135(2)(a)(ii)." *Id.*, slip op. at 4.

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The dissenting Court of Appeals judge did assert that the trial court granted summary disposition on Plaintiff's closed head injury claim simply because Plaintiff failed to supply appropriate medical testimony under oath. However, the dissenting judge did state:

> Additionally, there is full agreement on the point of law that, even though plaintiff did not submit the necessary evidence to support a claim under MCL 500.3135(2)(G)(ii), she can still seek to establish a claim under the serious impairment provision of the statute. MCL 500.3135(1). This has been clear at least since *Churchman v Rickerson*, 240 Mich App 223; 611 NW2d 333 (2000).[71]

The Court of Appeals majority erroneously concluded that Kent County Circuit Court Chief Judge Paul J. Sullivan summarily dismissed Plaintiff's personal injury claim because Plaintiff failed to provide the trial court with testimony under oath from a properly qualified doctor that "there may be a serious neurological injury."

The trial court did review Plaintiff's submission from her family physician, and ruled that it did not qualify as appropriate testimony under oath for purposes of MCL 500.3135(2)(a). As the trial court stated:

> For a question of fact to be created in regards to a closed head injury, a licensed allopathic or osteopathic physician who regularly diagnoses such injuries must testify under oath that there may be a serious neurological injury. MCL 500.3135(2)(a)(ii). Plaintiff has provided the affidavit of Mervyn Smith, a doctor who specializes in family practice, which states that plaintiff's symptoms may meet this threshold. Because MCL 500.3135 requires that the testimony provided by from a licensed allopathic or osteopathic physician and Dr. Smith is a family practitioner, he does not fulfill the statutory requirement. However, the deposition testimony of Dr. VandenBerg, an allopath was provided. Nevertheless, his testimony fails to fulfill the statutory requirement as it does not state that the mild traumatic brain injury rose to the level of a serious neurological injury. Accordingly, the court is of the opinion that there is no question of

[71] *Id.*, slip op., dissent at 1. Defendants presume that the dissent's statutory citation contains a typographical error, and that Judge Murray's reference to MCL 500.3135(2)(G)(ii) was intended to refer to MCL 500.3135(2)(a)(ii).

fact regarding the closed head injury and this issue may likewise be decided as a matter of law.[72]

After it determined that Plaintiff's claim of a threshold injury due to the closed head injury was a question of law, and that Plaintiff was not entitled to an automatic jury question on that injury, the trial court proceeded to review the closed head injury in light of each of the *Kreiner* factors. The trial court would not have done so, if it believed that Plaintiff was precluded from satisfying the statutory threshold on the closed head injury claim simply because she had not offered proper medical testimony under oath, as described in MCL 500.3135(2)(a). Rather, the trial court held that the matter was a question of law to be determined under the *Kreiner* factors, and after a review of those factors, held that Plaintiff's mild closed head injury did not qualify as a serious impairment of body function, as a matter of law. Thus, the trial court clearly complied with the Court of Appeals' holding in *Churchman, supra.*

B. *Churchman v Rickerson* Was Wrongly Decided.

Defendants contend that *Churchman* was wrongly decided and that MCL 500.3135(2)(a)(ii), properly construed, *requires* a plaintiff to provide the trial court with the medical testimony described in the statute, in order to present a threshold injury claim. Here, because Plaintiff did not present that evidence to the trial court, Defendants are entitled to summary disposition on her claim for closed-head injury.

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[72] Trial Court opinion dated August 18, 2006, p 3.
Plaintiff later moved for reconsideration of this opinion in the trial court, arguing that Dr. Mervyn Smith was indeed a licensed allopathic physician. The trial court issued an opinion dated September 8, 2006, addressing that issue. Therein, the trial court agreed that Dr. Smith was indeed a licensed allopathic physician, but nonetheless ruled that Dr. Smith's "affidavit" did not meet the requirements of MCL 500.3135(2)(a)(ii) because the writing was not given under oath and because there was no indication in the writing that Dr. Smith "regularly" treats closed head injuries. The trial court also noted that the "affidavit" was not produced by Plaintiff until counsel for the parties appeared before the trial court for oral argument on Defendants' motion for summary disposition, and was therefore untimely. Trial Court Opinion dated September 8, 2006, pp 1-2.

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In *Churchman, supra* at 232, the Court of Appeals considered the language of MCL 500.3135(2)(a)(ii) regarding closed head injuries, and held that the presentation by the plaintiff of testimony under oath from a properly qualified physician was not "the exclusive manner in which a plaintiff who has suffered a closed-head injury may establish a factual dispute precluding summary disposition." As the Court stated:

> In the absence of an affidavit that satisfies the closed-head injury exception, a plaintiff may establish a factual question under the broader language set forth in subsection 3135(2)(a)(i) and (ii), which, as noted above, provide that whether an injured person has suffered serious impairment of body function is a question for the court unless the court finds that 'there is no factual dispute concerning the nature and extent of the person's injuries,' or, if the court finds that there is such a factual dispute, that 'dispute is not material to the determination as to whether the person has suffered a serious impairment of body function . . . .'[73]

While *Churchman's* holding has been followed by various panels of the Court of Appeals,[74] the instant case appears to be the first published opinion to expressly follow *Churchman*. Yet, the *Churchman* holding was impliedly criticized in an unpublished decision issued by one recent Court of Appeals panel, *Hamad v Farm Bureau Gen Ins Co*, 2006 Mich App LEXIS 3551, at *3, unpublished decision of the Michigan Court of Appeals (Docket No. 265971), decided November 28, 2006, where the Court of Appeals stated:

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[73] *Churchman, supra* at 232.

[74] See *Modrzejewski v Beddingfield*, 2007 Mich App LEXIS 437, unpublished decision of the Michigan Court of Appeals (Docket No. 271247), decided February 22, 2007); *McCall v Dorch*, 2007 Mich App LEXIS 98, unpublished decision of the Michigan Court of Appeals (Docket No. 269817), decided January 23, 2007); *Hamad v Farm Bureau Gen Ins Co*, 2006 Mich App LEXIS 3551, unpublished decision of the Michigan Court of Appeals (Docket No. 265971), decided November 28, 2006; *Benedict v State Farm Mut Auto Ins Co*, 2006 Mich App LEXIS 3550, unpublished decision of the Michigan Court of Appeals (Docket No. 265595), decided November 28, 2006; *Cockle v Anderson*, 2006 Mich App LEXIS 3148, unpublished decision of the Michigan Court of Appeals (Docket No. 261884), decided October 24, 2006; *Nelson v Vasich*, 2006 Mich App LEXIS 2756, unpublished decision of the Michigan Court of Appeals (Docket No. 269082), decided September 21, 2006; *Guerrero v Smith*, 2006 Mich App LEXIS 2586, unpublished decision of the Michigan Court of Appeals (Docket No. 268477), decided August 22, 2006; *Ashcraft v McLaughlin*, 2006 Mich App LEXIS 1435, unpublished decision per curiam of the Michigan Court of Appeals (Docket No. 266116), decided April 25, 2006; *Ballard v Drouse*, 2006 Mich App LEXIS 794, unpublished decision of the Michigan Court of Appeals (Docket No. 264758), decided March 21, 2006; *Amos v Keller Transfer Line*, 2005 Mich App LEXIS 1033, unpublished decision of the Michigan Court of Appeals (Docket No.254232), decided April 26, 2005.

> In this case, plaintiff did not present medical testimony that dealt with his closed-head injury and satisfied the second sentence of subsection 3135(2)(a)(ii). In our opinion, the wording of MCL 500.3135(2)(a) is somewhat ambiguous. It is at least arguable that the Legislature, in adding the second sentence of subsection 3135(2)(a)(ii), meant to *require* that a plaintiff in a closed-head injury case, in order to have the 'serious impairment' issue assessed by a jury, provide testimony of a physician as described in the statute. Indeed, in [*Kreiner, supra* at 132 n 15], the Court noted that MCL 500.3135(2)(a)(ii) created "a special rule for closed head injuries. . . .'
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> * * *
>
> In light of *Churchman*, the holding of which is binding on this Court under MCR 7.215(J)(1), and in light of the unclear meaning of the phrase 'special rule' in *Kreiner*, we conclude that plaintiff, in order to have the 'serious impairment' issue submitted to a factfinder, was not required to provide testimony of a physician as described in MCL 500.3135(2)(a)(ii).[75]

Defendants agree with the *Hamad* panel. The plain language of the statute indicates that the Legislature intended the language of §3135(2)(a)(ii) to *require* that an auto accident plaintiff alleging a closed head injury provide medical testimony under oath as described in the statute, in order to avoid the entry of summary disposition on that claim.

Defendants respectfully request that this Court grant leave to appeal in this case to provide guidance to the bench and bar, regarding cases where a plaintiff presenting a closed-head injury claim does not supply the medical testimony described in §3135(2)(a)(ii).

If the statute is interpreted as Defendants contend, this issue would be outcome determinative of Plaintiff's claim for non-economic damages related to her closed head injury and Defendants would be entitled to summary disposition on that claim, as a matter of law.

[75] Emphasis in original; internal footnote omitted.

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III. Plaintiff Did Not Suffer A Serious Impairment Of Body Function Related To The Closed Head Injury.

A. Standard of Review.

"This Court reviews de novo the grant of denial or summary disposition. Similarly, questions of statutory interpretation are reviewed de novo." *Kreiner*, *supra* at 129 (internal citations omitted).

B. Lower Court Holdings.

The trial court reviewed Plaintiff's closed head injury under each of the *Kreiner* factors, and determined that the injury did not rise to the level of a serious impairment of body function, as a matter of law. The trial court first found that the closed head injury represented an impairment of an important body function, and that the injury was objectively manifested.[76] The trial court next found that "the extent of plaintiff's injuries were moderately severe," but nonetheless concluded that "the duration of the impairments was not prolonged."[77]

The trial court also found that "plaintiff has suffered from headaches, dizziness, and cognitive deficiencies for which she attended speech, language, and vestibular therapy." However, the trial court further found that the "treatment required for the closed head injury" was limited to only three office visits to the Spectrum Mild Brain Injury Clinic, as well as speech, language, and vestibular therapy between October 9 and November 27, 2002. [78]

> Immediately after the accident plaintiff suffered from dizzy spells, but by December 2002 her treating physician felt that these spells were no longer a concern of any significance. Plaintiff does continue to experience headaches, but the intensity and duration of these has significantly

[76] Trial Court Opinion dated August 18, 2006, pp 3-4.
[77] *Id.*, at pp 4-5.
[78] *Id.*

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> decreased. Although plaintiff feels that she is more forgetful now than before the accident, she successfully completed the long and short term goals of the recommended therapies designed to assist her with the cognitive deficiencies and her doctor did not believe that further therapy was needed.
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> Plaintiff has minimal residual impairment from the injuries received in the accident. . . . Plaintiff stated at her deposition that she still gets dizzy episodes approximately twice per month and that she continues to have headaches daily; however plaintiff has not been prescribed any medication for the headaches and they are short lasting. Finally, plaintiff attributes her forgetfulness to the accident, as well as occasional blurry vision. Although plaintiff identifies her memory issues as ongoing, she does not feel the need to return to physical therapy to assist with this.
>
> Looking at the totality of the circumstances, it is the opinion of the court that plaintiff has not suffered a serious impairment of body function. Plaintiff had physician imposed restrictions relating to heavy lifting, bending, and prolonged standing for several months following the accident, but these were similar restrictions as those she had prior to the accident which were the result of her kidney surgery. Plaintiff states that since the accident she has required assistance with household chores, however her daughters and grandsons were already providing much of this assistances before the accident occurred. Although plaintiff argues that her social activities have changed, this is not the result of any physician imposed restrictions. Immediately following the accident plaintiff stopped playing cards with her sisters due to the neck pain, but according to plaintiff's own testimony her neck pain has since resolved. Plaintiff states that she does not walk as much or dance to the radio any more, but again, these appear to be self-imposed restrictions. The fact that plaintiff has some lingering pain and forgetfulness which has not significantly affected her life is insufficient to overcome the high threshold statutorily demanded.[79]

The Court of Appeals majority reversed the trial court's ruling, holding that "the 'trajectory' of plaintiff's 'normal' life, past the age of 70, where her ability to take care of herself and enjoy socializing with friends and family, would seem to have been at least potentially affected."[80]

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[79] *Id.*, at pp 5-6.
[80] *Minter*, *supra*, slip op. at 4 (emphasis added).

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The dissenting Court of Appeals judge would have affirmed the trial court's ruling, finding as follows:

> Viewing the evidence submitted to the trial court in the light most favorable to plaintiff, the trial court did not err in granting defendants' motion on this issue. As noted in Section I of this opinion, before the accident plaintiff was receiving social security disability payments, was suffering from significant low back pain, and was restricted by her physician from any heavy lifting or prolonged standing. Plaintiff also had the assistance of family members with her household work, and plaintiff did not drive an automobile. As a result of the August accident, plaintiff suffered a mile head injury. However, it is undisputed that by no later than December, some four months after the accident, plaintiff's physician had concluded that plaintiff had fully recovered and no longer needed any physician care. Plaintiff also admitted that her headaches and the dizziness had essentially subsided, and she did not seek any further medical attention. Additionally, according to plaintiff's deposition testimony, no restrictions were ever placed on her by a physician.
>
> In light of these facts, it is evident the injuries did not change the course or trajectory of plaintiff's life. Plaintiff still had assistance from her family as she had in the past, plaintiff still did not drive a car, and plaintiff essentially carried on with her life as she had in the past. Indeed, although plaintiff imposed some limitations on her social activities during the August through December time frame -- that was by her own choice. *Kreiner, supra* at 133, n 17. Hence, the trial court correctly held the plaintiff had not established that her impairment interfered with her general ability to lead a normal life.[81]

C. The Trial Court Correctly Found That The Closed Head Injury Did Not Affect The Course Or Trajectory Of Plaintiff's Entire Normal Life.

The Court of Appeals majority committed error requiring reversal when it overruled the trial court's determination that Plaintiff's mild closed head injury did not affect the course or trajectory of Plaintiff's normal life, and therefore did not rise to the level of a serious impairment of body function.

To meet the requisite threshold, the impairment of an important body function must affect the course or trajectory of a person's entire normal life:

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[81] *Id.*, slip op., dissent at 5 (internal footnotes omitted).

> The starting point in analyzing whether an impairment affects a person's "general," i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long. Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still "generally" be able to perform that activity.[82]

In this case, the duration any impairments suffered by Plaintiff related to the closed head injury were "not prolonged."[83] Plaintiff's treating specialist for the closed head injury testified that Plaintiff had completed all short term and long term goals of treatment within only 4 months from the date of the accident, and testified that Plaintiff's condition did not require any further medical treatment.

Furthermore, it is clear that in this case, Plaintiff's ability to lead her normal life is essentially unchanged. Plaintiff had no physician imposed restrictions related to the closed head injury. While Plaintiff stated that she no longer ran, no longer wore high heeled shoes, and no longer danced to the radio at home, her self-imposed decision to limit those activities was related to the cervical strain injury, not the closed head injury. The Court of Appeals upheld the trial court's ruling that the cervical strain injury did not satisfy the threshold required to recover non-economic damages, as a matter of law. Plaintiff simply did not testify regarding any significant change in her ability to live her normal pre-accident life, related to the closed head injury. As the trial court correctly concluded, "[t]he fact that plaintiff has some lingering pain and forgetfulness which has not significantly affected her life is insufficient to overcome the high threshold statutorily demanded."[84]

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[82] *Kreiner*, *supra* at 130-131.
[83] Trial Court Opinion dated August 18, 2006, p 5.
[84] *Id.*, at pp 5-6.

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It is true that "[a] closed head injury may cause damage that ranges from mild to profound."[85] However, in order to satisfy the statutory threshold, a Plaintiff must show more than a simple closed-head injury. The plaintiff must show that the closed-head injury is "serious," meaning that the injury is "severe."

> Although the statute in question does not define 'serious," Black's Law Dictionary defines 'serious,' when used to describe an injury, illness or accident, as 'dangerous; potentially resulting in death or other severe consequences . . . .' Black's Law Dictionary (7th ed), p 731. Accordingly, the plain language of the statute requires some indication by the doctor providing testimony that the injury sustained by the plaintiff was severe.[86]

Plaintiff's proofs in this case did not even come close to demonstrating that the closed head injury was severe in nature. The trial court correctly ruled that Plaintiff's proofs fail, as a matter of law, to satisfy the statutory requirement of a serious impairment of body function related to the closed head injury. Defendants were entitled to summary disposition on this claim, and the Court of Appeals' decision to the contrary must be reversed.

Furthermore, the Court of Appeals majority's statement that Plaintiff's "ability to take care of herself and enjoy socializing with friends and family, would seem to have been at least potentially affected"[87] indicates that the majority did not apply the correct standards in reviewing this trial court decision granting summary disposition. In opposing a summary disposition motion, a plaintiff may not simply promise to offer evidence at trial to support their claim. Instead, a plaintiff must offer testimony or documentary evidence, which is admissible under the court rules, establishing a genuine issue of material fact sufficient to defeat the motion for summary disposition.

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[85] *Churchman, supra* at 229 (internal citation omitted).
[86] *Id.* at 230.
[87] *Minter, supra*, slip op. at 4 (emphasis added).

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Further, §3135(2)(a)(ii) is not satisfied by a showing that a plaintiff's normal life may be "potentially affected" by an injury. Here, the Court of Appeals majority applied an erroneous standard in reviewing the trial court's decision to grant Defendants' motion for summary disposition.

IV. Plaintiff Did Not Suffer A Permanent Serious Disfigurement Related To The Facial Scar.

A. Standard of Review.

"This Court reviews de novo the grant of denial or summary disposition. Similarly, questions of statutory interpretation are reviewed de novo." *Kreiner*, *supra* at 129 (internal citations omitted).

B. Lack Of Published Precedent Interpreting The "Permanent Serious Disfigurement" Threshold Standard.

This Court most recently construed the threshold injury standards of MCL 500.3135 in *Kreiner*, *supra.* However, that case concerned only the "serious impairment of body function" component of § 3135. The facts of the *Kreiner* case did not present and this Court did not address therein the "permanent serious disfigurement" component of § 3135. It appears to these Defendants that the instant case presents the first published decision of a Michigan appellate court, since the 1995 statutory amendments, substantively addressing a scar in light of the "permanent serious disfigurement" standard set forth in MCL 500.3135(1).[88]

[88] *Kern v Bethen-Coluni, supra,* involved a plaintiff with four surgical scars. However, the trial court in that case failed to make a ruling on the issue of "permanent serious disfigurement" and the Court of Appeals held that there was insufficient information in the appellate record for that Court to decide the issue. Accordingly, the *Kern* Court remanded the case to the trial court for a ruling on whether the plaintiff's surgical scars qualified as a permanent serious disfigurement. *Kern*, *supra* at 344-345. However, the *Kern* court did offer the general observation that under the 1995 amendments to §3135, "the determination whether a disfigurement constitutes 'permanent serious disfigurement' is a question of law absent a genuine outcome-determinative factual dispute." *Id.* at 344.

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While Defendants are aware of several published Court of Appeals decisions touching on the "permanent serious disfigurement" issue in the context of scars (aside from the instant case),[89] all of those decisions pre-date the 1995 amendments to §3135. The remaining appellate court decisions regarding the issue of "permanent serious disfigurement" are all unpublished. Defendants respectfully request that this Court grant leave to appeal in the instant case in order to provide clarification and guidance to the bench and bar regarding the proper application of the "permanent serious disfigurement" threshold standard set forth in MCL 500.3135(1).

C. Current State Of The Case Law Applying The "Permanent Serious Disfigurement" Standard To Scars.

The current case law from the Michigan Court of Appeals provides that, for purposes of MCL 500.3135(1), "whether an injury amounts to a permanent serious disfigurement depends on its physical characteristics rather than on its effect on the plaintiff's ability to live a normal life." *Kosak v Moore,* 144 Mich App 485, 491; 375 NW2d 742 (1985), citing *Williams v Payne,* 131 Mich App 403, 411; 346 NW2d 564 (1984). Whether a scar is serious is decided by resort to common knowledge and experience, using an objective, rather than a subjective, standard. *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985) (finding that a 3 cm scar under the plaintiff's eye, which was "slightly depressed and slightly lighter than the surrounding skin" was not a permanent serious disfigurement). Whether a scar is a serious disfigurement depends on its physical characteristics. *Id.*; *Kanaziz v Rounds*, 153 Mich App 180, 185-

[89] *See Kanaziz v Rounds*, 153 Mich App 180; 395 NW2d 278 (1986); *Nelson v Myers*, 146 Mich App 444; 381 NW2d 407 (1985); *Kosak v Moore*, 144 Mich App 485; 375 NW2d 742 (1985); *Williams v Payne*, 131 Mich App 403; 346 NW2d 564 (1984); and *Earls v Herrick*, 107 Mich App 657; 309 NW2d 694 (1981).

186; 395 NW2d 278 (1986) (finding that a jagged, star shaped scar on the plaintiff's eyelid was not a permanent serious disfigurement).

Not every scar qualifies as a "disfigurement," and not every "disfigurement" qualifies as a "permanent serious disfigurement." *Ashcraft v McLaughlin*, 2006 Mich App LEXIS 1435, *5-6, unp ublished decision per curiam of the Michigan Court of Appeals (Docket No. 266116), decided April 25, 2006 (affirming summary disposition in favor of defendant, finding no permanent serious disfigurement). Further, facial scars do not automatically qualify as a permanent serious disfigurement, simply because of their location on the human body. *Biazzi v Ibtissam*, 2006 Mich App LEXIS 943, *8-9, unpublished decision per curiam of the Michigan Court of Appeals (Docket No. 264017), decided April 4, 2006 (affirming summary disposition in favor of defendant, finding that the scar on the plaintiff's nose was not a serious permanent disfigurement).

In *Collins v Davis*, 2005 Mich App LEXIS 2527, unpublished decision per curiam of the Michigan Court of Appeals (Docket No. 256055), decided October 13, 2005, the Court held that a four-centimeter scar on plaintiff's forehead was not a permanent serious disfigurement, even though it was a different color than the surrounding skin and there was a noticeable indentation. In *Fairfax v Yaldo*, 2005 Mich App LEXIS 2154, unpublished decision per curiam of the Michigan Court of Appeals (Docket No. 261443), decided September 1, 2005, the Court held that a readily discernable one-inch scar on the plaintiff's nose was not a serious permanent disfigurement. In *Ross v State Farm*, 2005 Mich App LEXIS 1153, unpublished decision per curiam of the Michigan Court of Appeals (Docket No. 260402), decided May 12, 2005, the Court held that a one-centimeter scar on plaintiff's forehead was not a permanent serious disfigurement.

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In *Earls v Herrick*, 107 Mich App 657, 661; 309 NW2d 694 (1981), the plaintiff and her infant son both suffered facial scars. In the trial court, the parties disputed the length of the facial scars. While the appellate court record lacked any photographs of the facial scars, making it "difficult to review how the trial court found the scars not sufficiently serious" to meet the statutory threshold, the Court of Appeals nonetheless found a question of fact regarding the seriousness of the scars, sufficient to defeat a motion for summary disposition and to reach a jury. *Id.* at 667-668.

In *Lester v Castle*, 2006 Mich App LEXIS 1894, *10, unpublished decision per curiam of the Michigan Court of Appeals (Docket No. 267640), decided June 15, 2006, the Court found that "reasonable minds could differ regarding whether the scar is serious." Unfortunately, the Court's opinion does not specifically describe the scar in question, referring to it simply as a "surgery scar." *Id.* at *9.[90]

In *Sanders v Cantin*, 2003 Mich App LEXIS 2294, *5, unpublished decision per curiam of the Michigan Court of Appeals (Docket No. 240065), decided September 16, 2003, the Court considered a six-inch long, raised scar on the plaintiff's left abdomen above the waistline, which was "drastically darker than the surrounding skin, making it immediately apparent and distinguishable." The *Sanders* Court found that this scar qualified as a permanent serious disfigurement as a matter of law, and granted summary disposition in favor of the plaintiff on that issue, remanding for a trial only on the issue of damages.[91]

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[90] As the only surgery discussed in the Court's opinion related to the plaintiff's shoulder, Defendants assume that the scar in question appeared on the plaintiff's shoulder.

[91] Defendants find it to be an interesting coincidence that Judge O'Connell served on the Court of Appeals panels that decided *Sanders*, *Lester*, and *Minter* -- the only post-1995 cases finding a scar to qualify as a permanent serious disfigurement under MCL 500.3135(1).

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D. **Lower Court Opinions.**

In this case, the trial court found that Plaintiff's forehead scar did not qualify as a permanent serious disfigurement because it was "relatively small" and "not readily noticeable."[92] Therefore, the trial court granted summary disposition in favor of Defendants, holding that Plaintiff had not satisfied the statutory threshold for recovery of non-economic damages. As the trial court stated:

> Likewise, the scar on plaintiff's forehead does not constitute a permanent serious disfigurement. Whether a scar is a permanent serious disfigurement depends on the scar's physical characteristics rather than its effect on a person's ability to lead a normal life. *Kosak v Moore*, 144 Mich App 485, 291 (1985). Whether a scar is serious is a question to be answered by resorting to common knowledge and experience. *Nelson v Meyers*, 146 Mich App 444, 446 n 2 (1985). The scar must be readily noticeable; one that is "hardly discernible" will not be a permanent serious disfigurement. *Petaja v Guck*, 178 Mich App 577, 579-580 (1989).
>
> The scar on plaintiff's forehead is comprised of two parts one 11 millimeters and the other 13 millimeters in length. The color of the scar is slightly lighter than the surrounding skin tone. The scar is undeniably permanent, and considering its characteristics, including its size, color, and location, it is apparent that it constitutes a disfigurement. Nevertheless, it does not have the requisite seriousness to satisfy MCL 500.3135(1). The scar is relatively small and, upon review of the color photographs provided, is not readily noticeable. Indeed, recent case law lends support to the decision that plaintiff has not suffered a permanent serious disfigurement. *See Collins v Davis*, unpublished opinion per curiam of the Court of Appeals, decided Oct. 13, 2005 (Docket No. 256055) (four centimeter scar on forehead not a permanent serious disfigurement); *Goodwin v MacKellar*, unpublished opinion per curiam of the Court of Appeals, decided Jan. 25, 2005 (Docket No. 250280) (1.25 inch scar located near the eyebrow not a serious disfigurement).[93]

The Court of Appeals majority reversed the trial court's grant of summary disposition regarding Plaintiff's scar. As the Court of Appeals majority explained:

> Plaintiff contends that her scar causes her a considerable amount of embarrassment and discomfort, as well as an inability to move her

[92] Trial Court Opinion dated August 18, 2006, p 6.
[93] *Id.*

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> eyebrow in a "normal" manner. Defendants discount the scar as objectively too minor to constitute serious disfigurement. It appears that the parties dispute not only the impact of the scar on plaintiff, but the extent of the damage as well. Presuming the truth of plaintiff's contentions, the scar is not only visible, it causes a functional problem with her ability to express emotions or otherwise communicate nonverbally. If the issue was purely a cosmetic one, we would find this to be a much closer question. However, quite aside from appearance and embarrassment, a great deal of human face-to-face communication is nonverbal -- it involves facial expressions and bodily gestures that are, consciously or subconsciously, attended to and interpreted by others. If plaintiff truly cannot move her eyebrow in a normal or natural manner, that could add to a claim of disfigurement. And if a significant amount of her interaction with others is face-to-face, the scar could *objectively* be determined to have a great deal of impact on her life. We therefore find the parties' factual dispute regarding the scar is sufficient to give rise to a jury question.[94]

The dissenting Court of Appeals judge would have affirmed the trial court's grant of summary disposition regarding Plaintiff's scar, finding that it failed to qualify as a permanent serious disfigurement:

> The seriousness of a scar "depends on its physical characteristics rather than its effect on [a] plaintiff's ability to live a normal life." [*Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985).] The undisputed evidence, which is comprised of the color photographs of the scar, reveal a 13 mm scar above plaintiff's eyebrow that is only slightly lighter in color than plaintiff's skin tone. Additionally, plaintiff testified that it "itches" and, when she frowns, it bothers her. And, even through plaintiff stated that she was "somewhat" embarrassed about her scar, she has to date foregone the option of corrective surgery. More importantly, a plaintiff's embarrassment and sensitivity about her appearance is a subjective reaction to a condition that must be objectively judged by the trial court, and does not always create a question of fact. *Id.* Thus, the trial court did not err in concluding that plaintiff's scar did not constitute a "permanent serious disfigurement." See *id.* at 446-447 (holding that a three centimeter scar under a plaintiff's left eye, which was slightly depressed, and was slightly lighter than surrounding skin, was not a permanent serious disfigurement).[95]

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[94] *Minter*, *supra*, slip op. at 5.
[95] *Id.*, dissent slip op. at 6-7.

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E. A Plaintiff's Subjective Emotional Reaction To A Scar Is Not The Proper Test For Determining The Existence Of A Permanent Serious Disfigurement.

Defendants contend that the Court of Appeals majority erroneously considered subjective complaints of embarrassment when evaluating Plaintiff's scar under the permanent serious disfigurement threshold. Although it did not specifically cite to any prior authority on point, the Court of Appeals majority did cite the factor of embarrassment in reviewing whether Plaintiff's scar met the statutory threshold for recovery of non-economic damages.[96]

In two recent unpublished decisions, the Court of Appeals has also held that a plaintiff's subjective emotional reaction to a scar should be considered when determining, as a matter of law, whether that scar qualifies as a permanent serious disfigurement. *Ashcraft, supra* at *5 ("medical testimony is not required to establish the seriousness of a disfigurement. The impact of a scar largely lies in the emotional effects it has on an individual"); *Biazzi, supra* at *7-8 (a trial court must consider a plaintiff's subjective embarrassment and sensitivity to scarring). This analysis seems to have its roots in *Earls v Herrick*, 107 Mich App 657, 668; 309 NW2d 694 (1981), where the Court of Appeals held that "almost any facial scar which is immediately noticeable might result in serious emotional effects for the individual who must bear the scar."

Defendants contend that a plaintiff's subjective embarrassment and sensitivity to scarring is analogous to a plaintiff's subjective complaints of pain or discomfort regarding a bodily injury. In *Kreiner, supra* at 133, n 17, this Court held that "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or

[96] *Id.*, slip op. at 5.

perceived pain do not establish" residual impairment, for purposes of evaluating a serious impairment of body function under MCL 500.3135(1).[97]

Defendants contend that a plaintiff's subjective complaints of embarrassment are analogous to a plaintiff's subjective complaints of pain or discomfort. Such complaints are not objective factors, upon which a court may properly rely to determine that an auto accident plaintiff has suffered a permanent serious disfigurement. At the very least, embarrassment regarding a scar should be subject to a "reasonable person" standard. One plaintiff may honestly feel an extraordinary amount of embarrassment over a scar which, when viewed objectively or when viewed by a reasonable person, does not qualify as a "serious" disfigurement for purposes of MCL 500.3135(2)(a)(ii). Another plaintiff may react to the same injury differently, experiencing a much lower level of embarrassment or self-consciousness. The trial courts of this state need an objective standard by which to judge whether a scar qualifies, as a matter of law, as a permanent serious disfigurement. The answer to that question should not differ based on the subjective emotional reaction that a plaintiff has to a scar.

In this case, the dissenting Court of Appeals judge adopted the approach set forth in *Nelson, supra* at 446, when he stated that "a plaintiff's embarrassment and sensitivity about her appearance is a subjective reaction to a condition that must be objectively judged by the trial court, and does not always create a question of fact."[98] To the extent that the Court of Appeals majority opinion in the instant case relied on subjective complaints of embarrassment in reviewing the seriousness of Plaintiff's scar, that holding is in conflict with *Nelson*, *supra*.

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[97] See also *McDanield v Hamker*, 268 Mich App 269, 283; 707 NW2d 211 (2005).
[98] *Minter*, *supra*, dissent slip op. at 7.

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Further, recent unpublished decisions from the Court of Appeals focus heavily on the extent of subjective embarrassment over a scar as the primary tool of determining the scar's seriousness. *Ashcraft, supra; Biazzi, supra.* Defendants respectfully request that this Court grant leave to appeal in the instant case to provide guidance to the bench and bar with regard to whether subjective complaints of embarrassment are properly considered by a trial court attempting to determine whether a scar qualifies as a "permanent serious disfigurement" under MCL 500.3135(2)(a).

F. On The Facts Of This Case, Plaintiff's Scar Does Not Qualify As A Permanent Serious Disfigurement.

As the trial court noted in its opinion, the medical records indicated that the scar above Plaintiff's right eye is comprised of two parts: one 11 millimeters in length and one 13 millimeters in length.[99] The trial court also noted in its opinion that "the color of the scar is slightly lighter than the surrounding skin tone." The dissenting Court of Appeals judge agreed that the scar "is only slightly lighter in color than plaintiff's skin tone." The Court of Appeals majority did not expressly take issue with these conclusions regarding the length or color of Plaintiff's scar.

The Court of Appeals majority did, however, create "potential" injuries and complaints for Plaintiff, which are completely unsupported by any testimony or documentary evidence in the trial court record. The majority found that Plaintiff's scar "causes a functional problem with her ability to express emotions or otherwise communicate nonverbally."[100] This conclusion was not supported by any evidence in the trial court record.

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[99] There was no dispute in the trial court regarding the length of the scars.
[100] *Minter, supra*, slip op. at 5.

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The majority then compounded its error by concluding that, "*If* plaintiff truly cannot move her eyebrow in a normal or natural manner, that could add to a claim of disfigurement. And if a significant amount of her interaction with others is face-to-face, the scar could objectively be determined to have a great deal of impact on her life."[101] Plaintiff did not testify that she could not move her eyebrow in a normal manner, and did not testify that a significant amount of her interaction with others is face-to-face. Plaintiff simply testified that when she did frown or wrinkle her forehead, that she felt irritation, and that occasionally the scar would itch. She did not testify that she could not frown or wrinkle her forehead. The Court of Appeals majority improperly attempted to create factual issues for Plaintiff in order to overcome the high statutory threshold of a permanent serious disfigurement. This holding was improper, and should be reversed.

In the present case, Plaintiff cannot satisfy the "threshold" to recover non-economic damages for a "serious permanent disfigurement," related to the scar above her eyebrow.

G. The Appellate Courts Should Review A Trial Court's Decision Regarding A Scar Only For An Abuse of Discretion.

In *Kanaziz*, *supra* at 186, the Court of Appeals adopted language from *Williams, supra*,[102] indicating that a trial court's rulings regarding serious permanent disfigurements should be accorded deference by the appellate courts:

> This Court's review of the trial court's decision whether a plaintiff has suffered a permanent serious disfigurement was aptly stated in *Williams*, *supra*, 131 Mich App 411-412:

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[101] *Id.*

[102] Defendants note that in the *Williams* case, the plaintiff suffered "a cut to the forehead requiring 11 or 12 stitches." *Id.* at 411. While the jury in that case rendered a general verdict of no cause of action, the Court of Appeals was unclear as to whether the verdict was due to a failure of proofs on the issue of proximate cause, or to the jury's disbelief that the scars constituted a permanent serious disfigurement. The Court of Appeals therefore vacated the no cause judgment related to the facial scar and remanded for a new trial consistent with the standards set forth in the *Cassidy* opinion. *Id.* at 412.

> Disfigurement goes to the physical characteristics of an injury rather than the injury's effect on the victim's lifestyle. Ascertaining the seriousness of the disfigurement may often require physical observation by the trial court. . . . In disfigurement cases based on physical observation, the appellate courts must grant great deference to the observations of the trial court on what is, in effect, a factual conclusion about the severity of an injury. The victims cannot be expected to parade their maladies through an appellate courtroom. The trial court is expected to make adequate findings on the record. . . . It will describe the injuries and reach a legal conclusion on whether they meet the threshold. We will review the trial court's determination, reversing only when the court has abused its discretion.

In this case, the Court of Appeals majority did not accord any deference to the trial court's findings "on what is, in effect, a factual conclusion about the severity of" Plaintiff's facial scar, contrary to the holding in *Kanaziz, supra*.

It is true that this Court reviews de novo the grant of denial or summary disposition, and that questions of statutory interpretation are reviewed de novo." *Kreiner*, *supra* at 129 (internal citations omitted). However, *Kanaziz* set forth a more deferential standard of review with regard to a trial court's findings concerning the seriousness of a facial scar. In essence, the *Kanaziz* Court found that this inquiry was a mixed question of fact and law. With regard to those physical observations that amounted to a determination on a question of fact (such as the difference in color between the scar and the surrounding skin, for instance), the *Kanaziz* Court held that the trial court's determination should be reviewed only for an abuse of discretion.

If *Kanaziz* is correct, and the Court of Appeals is to utilize a deferential standard of review regarding a trial court's observations of a plaintiff's scarring, then the Court of Appeals majority in the instant case erred as a matter of law, in failing to accord any deferential review to the trial court's findings. If *Kanaziz* is correct, then this Court

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should expressly reaffirm and adopt that ruling, in this case. If *Kanaziz* is incorrect, and the Court of Appeals is not to utilize a deferential standard of review, then this Court should expressly overrule *Kanaziz*. For this reason, this Court should grant leave to appeal in this case, to provide guidance to the bench and bar on these issues.

CONCLUSION

Defendants City of Grand Rapids and John Edward Rheem Wetzel hereby request that this Court grant Defendants' application for leave to appeal, and award one of the following forms of relief:

(1) issue a peremptory opinion or order **REVERSING** the opinion of the Michigan Court of Appeals and reinstating the trial court's grant of summary judgment, or

(2) **GRANT** the application for leave to appeal and after full briefing and oral argument, issue an opinion **REVERSING** the opinion of the Michigan Court of Appeals.

Respectfully submitted,

THE CITY OF GRAND RAPIDS,
a Michigan municipal corporation, and
JOHN EDWARD RHEEM WETZEL,
an individual,

Dated: May 23, 2007

By: Catherine M. Mish
CATHERINE M. MISH (P52528)

Assistant City Attorney
Attorney for the City of Grand Rapids
and John Edward Rheem Wetzel
300 Monroe Ave., NW
Grand Rapids, MI 49503
(616) 456-4023

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